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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1029

MARYLAND CASUALTY COMPANY,
Petitioner,

vs.

COUNTY OF ALLEGHENY, a Political Subdivision of the Commonwealth of Pennsylvania.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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The Circuit Court of Appeals Has Decided Important Questions of Local Law in Manner in Conflict With Applicable Local Decisions and Applicable Local Equity Rules.

The Circuit Court of Appeals held that "With no final adjudication on the meritorious issue involved in *Bassett* v. *Armstrong,* it follows that the judgment in that case does not control the present suit". The Circuit Court further said that there was no specific decision on the exact point by Pennsylvania courts. It is our contention that the mandate in Pennsylvania Equity Rule 66 and the decisions of the Pennsylvania Supreme Court do specifically hold that, under the circumstances of the *Bassett* case, it was finally adjudicated.

Maryland Casualty, as a third separate defense (R. 64), pleaded the *Bassett* case as *res judicata* of the issues in the instant case. It introduced in evidence thereof the complete record of the proceedings and trial in the Court of Common Pleas of Allegheny County before the Chancellor, before the Court *en banc* and before the Supreme Court of Pennsylvania (R. 1917-2150, inc.). At the conclusion of the plaintiffs' evidence in the *Bassett* case, the plaintiffs having rested, counsel for Poole, one of the defendants, moved the Court to dismiss the bill (R. 2070). The Chancellor granted the motion and, in an order filed December 29, 1931, dismissed the bill (R. 2082), and filed an opinion under Pennsylvania Equity Rule 13 giving his reasons for so doing (R. 2078-2082, inc.). The plaintiffs filed exceptions to the decree of dismissal (R. 2084-2092, inc.). Following Pennsylvania practice, the matter then came before the Court *en banc*, and the Court *en banc*, on March 22, 1932, entered an order overruling the exceptions filed by the plaintiffs and affirming the order of December 29, 1931 dismissing the bill (R. 2094). In an opinion filed, it directed the entry of said order as a final decree (R. 2093-2094). Plaintiffs then appealed to the Supreme Court of Pennsylvania, and the Supreme Court, in an opinion filed November 28, 1932, affirmed the decree of the court below and dismissed the appeal (R. 2131-2134).

Under Pennsylvania Equity Rule 66, upon the filing of the exceptions by the plaintiffs to the decree, and the refusal of the Court *en banc* to change the decree, the decree became a final decree for all purposes exactly as if it had been entered after hearing of both parties.

The applicable part of Pennsylvania Equity Rule 66 reads as follows:

> "If exceptions are filed to such a decree, and the court or referee refuses to change it, it shall become

> a final decree for all purposes, and subject to appeal exactly as if it had been entered after a hearing of both parties."

Under the specific mandate of Pennsylvania Equity Rule 66, it was the filing of the exceptions and the overruling of them that created a situation of absolute finality as to the issues tendered by the plaintiffs' complaint, and that finality, according to the explicit language used in Pennsylvania Equity Rule 66, was "for all purposes". The entry of the order of dismissal by the Chancellor had the effect of a nonsuit at law, according to the express language of Equity Rule 66. Had the plaintiff Bassett stopped there, there would be no final determination of the question, but Bassett filed exceptions to the decree of dismissal, and, under Equity Rule 66 in such a case, the decree became final for all purposes as if it had been entered after hearing of both parties.

In *Central Pennsylvania Lumber Co.* v. *Carter,* 348 Pa. 429, 35 Atl. (2d) 282, the Court said:

> "While it is true that the mere entry of a compulsory nonsuit is not *res judicata* (Std. Pa. Prac., Vol. 6, §2); nevertheless, it is otherwise if plaintiff files a motion to set the nonsuit aside, as was done by appellants in the present controversy, and the decision is against him and he fails to take an appeal and secure a reversal."

In *Fine* v. *Soifer,* 288 Pa. 164, 135 Atl. 742, *notwithstanding the plaintiff's claim was never considered on the merits,* the refusal of the Court *en banc* to take off a nonsuit was held by the Pennsylvania Supreme Court to have resulted in a final judgment which barred a later suit. The Court said:

> "Whereas it is not the nonsuit, but the refusal to take it off, which makes the facts involved *res judicata;* * * *"

The Supreme Court of Pennsylvania, in its opinion filed, charaterized the Chancellor's opinion as a finding of fact (R. 2132). The Circuit Court regarded the so-called findings as mere statements. They were at least reasons required under Pennsylvania Equity Rule 13 and they considered the merits.

When the plaintiff Bassett appealed to the Supreme Court of Pennsylvania, that Court affirmed the decree and dismissed the bill, thereby removing all question as to the finality of the order of dismissal. If the Supreme Court of Pennsylvania wanted to avoid the effect of *res judicata,* it would have followed its usual practice of simply dismissing the appeal. *In re Appeal of Sholter et al.,* 325 Pa. 48, 188 Atl. 112; *Werner* v. *King,* 310 Pa. 120, 164 Atl. 918; *Maloney* v. *District No. 1 United Mine Workers of America,* 308 Pa. 251, 162 Atl. 225. Or it could have ordered the Chancellor to vacate the decree and dismiss the bill on the ground that the question was moot. *Leader* v. *Apex Hosiery Company,* 302 U. S. 656.

Accordingly, we have a final order of a Pennsylvania court affirmed on appeal, *Bassett et al.* v. *Armstrong et al.,* 309 Pa. 296, 163 Atl. 525. It should control the instant case.

To dispose of the holding by the Circuit Court of Appeals that section 69(2) of Restatement, Judgments, governs, it need only be pointed out that even if that section does restate properly the Pennsylvania law, it is patently not applicable here. Section 69(2) deals with a case where a party to a judgment *cannot* obtain a decision of an appellate court because the matter determined *against him* is moot. This section is based on the case of *Gelpi* v. *Tugwell* (C. C. A. 1, 1941) 123 Fed. (2nd) 377. (See

example given in Restatement, Judgments, Sec. 69(2), and see also 56 Harv. L. R. 1 (Sept. 1942), an explanatory article written by one of the Reporters for the Restatement). In the *Gelpi* case the losing party was prevented from appealing from a denial of her petition for writ of mandamus to compel her reinstatement to public office, solely because the term of office concerned had expired before the appeal could be heard. A review was thus prevented, and without fault on the part of the party seeking relief. But in the *Bassett* case the fact was otherwise. Mootness did not destroy the right of the County to appeal, because the County never had the right to appeal. Its answer *asked* for the dismissal of the Bassett complaint, and hence the ruling of the Chancellor in granting that request and the action of the court en banc in dismissing the plaintiffs' exceptions were in strict accordance with the county's prayer. It follows that Restatement, Judgments, Section 69(2) was not intended to cover such a situation. Further, under clear rulings of the Pennsylvania Court, one who pursues or is instrumental in inducing a court to make a decree cannot thereafter complain of the decision in an appellate court. *Appeal of Bigham*, 123 Pa. 262, 16 Atl. 613; *Bergman* v. *Straus*, 264 Pa. 439, 107 Atl. 810; *In re Sherwood's Estate*, 206 Pa. 465, 56 Atl. 20.

The application of Section 49 of the Pennsylvania Sales Act.

The requirement of notice of breach of warranty required by the Pennsylvania Sales Act is an absolute one, and the statute makes no exceptions. The giving of the notice is a statutory condition precedent to a statutory right (Williston on Sales (2d Ed.) Sec. 484A, pp. 1259-1260). Where the language of the statute is plain and unambiguous, an exception to the application of the statute should not be

engrafted thereon. *Farmers-Kissinger Market House Co. Inc.* v. *City of Reading, et al.*, 310 Pa. 493, 165 Atl. 398, 400. Nowhere in the Pennsylvania Sales Act appears the slightest intimation that the buyer is excused from giving notice if that would be a "vain act," and no decisions of Pennsylvania courts are brought forward to supply such excuse. On the contrary the Pennsylvania courts have been diligent to require a strict compliance with the notice requirement of the Sales Act. *Crunden Martin Mfg. Co.* v. *Turner*, 274 Pa. 425, 118 Atl. 365; *Aaron Bodek & Son* v. *Avrach*, 297 Pa. 225, 146 Atl. 546, and cases therein cited.

Conclusion.

Here then, we submit, the Circuit Court of Appeals has decided two important points of Pennsylvania law, both without benefit of sustaining Pennsylvania authority, both contrary to the wording and spirit of the pertinent Pennsylvania decisions, one contrary to the express wording of the Pennsylvania Equity Rule involved, and the other contrary to the express wording of the Pennsylvania statutes involved.

It is respectfully submitted that the relief prayed for by the Petition in this case should be granted and a Writ of Certiorari issued, directed to the Circuit Court of Appeals for the Third Circuit.

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